

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
	:	
of	:	
	:	
JOHN O. BUTLER COMPANY	:	DECISION
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1978	:	
through November 30, 1981.	:	

Petitioner, John O. Butler Company, 4635 West Foster Avenue, Chicago, Illinois 60630, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1978 through November 30, 1981 (File No. 39587).

A formal hearing was commenced before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on August 9, 1984 at 9:00 A.M. and continued on October 24, 1984 at 11:00 A.M. at the offices of the State Tax Commission at Building #9, State Office Campus, Albany, New York, and continued to conclusion at the same location on January 29, 1985 at 11:00 A.M., with all briefs to be submitted by September 3, 1985. Petitioner appeared by Cole & Deitz, Esqs. (Charles A. Simmons, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether sales of toothbrushes, dental floss, interdental brushes, disclosing tablets, non-professional mouth mirrors and fluoride packages are exempt from sales and use tax as sales of drugs and medicines or medical equipment and supplies within the meaning and intent of section 1115(a)(3) of the Tax Law.

II. Whether the aforementioned items, if medical equipment, were purchased at retail by dentists for use in performing medical and similar services for compensation.

FINDINGS OF FACT

1. On May 27, 1982, as the result of a field audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, John O. Butler Company, in the amount of \$71,360.05, plus interest of \$14,194.47, for a total due of \$85,554.52 for the period June 1, 1978 through November 30, 1981.

2. Petitioner manufactures and sells dental products. Petitioner sells its products directly to dentists and also to government agencies for resale. The dentists who purchase petitioner's products distribute these items to their patients. On audit, the Audit Division determined that all sales to government agencies were not subject to tax and that all sales to dentists were taxable sales of tangible personal property.

3. The items found to be subject to tax, along with the amount of sales and tax applicable to each, were as follows:

<u>ITEM</u>	<u>SALES</u>	<u>TAX AT 7.2%</u>
Butler Toothbrushes	\$352,440.00	\$25,375.68
Butler Proxabrushes	260,267.00	18,739.22
Red Cote Disclosing Tablets	14,569.00	1,048.97
Dental Floss	227,758.00	16,398.58
Mouth Mirrors (Non-Professional)	17,245.00	1,241.64
Fluoride Packages	5,947.00	428.18
Kits (Proxabrush/Mouth Mirrors/ Dental Floss/Toothbrush/ Disclosing Tablets)	110,807.00	7,978.10
Miscellaneous	2,082.00	149.90
TOTAL	\$991,115.00	\$71,360.27

The auditor did not analyze each item to determine its taxability, rather he relied on Department of Taxation and Finance publications stating that sales of

toothbrushes and dental floss were taxable and the auditor, therefore, determined that all of petitioner's products were subject to tax.

4. Petitioner presented expert testimony concerning the danger of plaque buildup on teeth and the role dental products play in removing plaque. Plaque is a population of bacteria which is entrapped within a sticky substance that accumulates on the teeth and at the gum margin. Failure to remove plaque could result in cavities and periodontitis. The latter encompasses gingivitis, the inflammation and bleeding of the gum tissue, and pyorrhea, the discharge of pus from the gums and surrounding tissue. Scientific testing has proven that brushing with a toothbrush aids in reducing plaque buildup and in preventing cavities, and periodontitis. Dental floss removes plaque from areas inaccessible to the toothbrush such as areas between the teeth and also prevents cavities and periodontitis. Proxabrush is a trade name for petitioner's interdental brushes which are used to clean plaque from areas inaccessible to both a toothbrush and dental floss such as between dentures and caps. The disclosing tablets are used to dye invisible plaque buildup on the teeth, thus making the plaque visible and able to be removed by brushing or flossing. The non-professional mouth mirrors are used to assist in finding areas of plaque dyed by the disclosing tablets and areas of inflamed gums. The fluoride packages contain a gel which is topically applied to the teeth to protect against plaque buildup and cavities. The dental care kits contain samples of each of the aforementioned items.

5. The dentists who purchase petitioner's dental care products do so to distribute them to some of their patients as an educational tool to encourage them to take preventive measures against cavities and plaque buildup. The dentists do not charge their patients an extra fee for the kits. At least one

of the dentists who testified considered the product distribution to be part of his service to the patient. None of the products distributed to patients are used by dentists directly on their patients with the exception of dental floss which is purchased in rolls of a larger quantity than are distributed to patients.

6. Petitioner maintains that its products are exempt from sales and use tax as medical equipment for use in the treatment or prevention of illness or diseases in human beings and that such equipment is not used by dentists in performing medical and similar services for compensation. Originally, the Sales Tax Law contained an exemption for drugs and medicines but not for medical supplies and equipment. The Department of Taxation and Finance worked in conjunction with the Department of Health to determine which pharmaceutical items were actually drugs and medicines and which were toiletries and cosmetics. Toothpaste was not considered to be a drug or medicine. In 1976, when the Sales Tax Law was amended to include an exemption for medical equipment, there were no consultations between the Departments, rather the original drug classifications were relied upon and, since toothpaste had been considered not to be a drug, all dental items for home use were considered not to be medical equipment. The individual at the Department of Health who was originally charged with the responsibility for determining the taxable status of drugs and medicines testified that had he been consulted in 1976 regarding medical equipment, he would have advised that the products at issue herein qualify as medical equipment under the amended law. Petitioner also points out that Federal agencies have classified these products as medical devices.

7. Petitioner maintains that it has been denied equal protection under the law pursuant to the Fourteenth Amendment of the United States Constitution

because other products similarly situated, such as chapped lip balm and athlete's foot treatments, are considered drugs and medicines while petitioner's products are considered toiletries.

8. Along with its brief, petitioner submitted proposed findings of fact, all of which have been incorporated in this decision with the exception of numbers 5, 20 and 34 which are irrelevant and numbers 16, 30 and 35 which are conclusory in nature.

CONCLUSIONS OF LAW

A. That section 1115(a)(3) of the Tax Law provides for an exemption from sales and use tax for sales of the following:

"Drugs and medicines intended for use, internally or externally, in the cure, mitigation, treatment or prevention of illnesses or diseases in human beings, medical equipment (including component parts thereof) and supplies required for such use or to correct or alleviate physical incapacity, and products consumed by humans for the preservation of health but not including cosmetics or toilet articles notwithstanding the presence of medical ingredients therein or medical equipment (including component parts thereof) and supplies, other than such drugs and medicines, purchased at retail for use in performing medical and similar services for compensation."

B. That 20 NYCRR 528.4(e) provides in part:

"(e) Medical equipment. (1) Medical equipment means machinery, apparatus and other devices (other than prosthetic aids, hearing aids, eye glasses and artificial devices which qualify for exemption under section 1115(a)(4) of the Tax Law), which are intended for use in the cure, mitigation, treatment or prevention of illnesses or diseases or the correction or alleviation of physical incapacity in human beings.

(2) To qualify, such equipment must be primarily and customarily used for medical purposes and not be generally useful in the absence of illness, injury or physical incapacity."

C. That assuming, without deciding, that the products in issue constitute medical equipment within the meaning of section 1115(a)(3) of the Tax Law, the products were, nevertheless, subject to sales tax because they were purchased at retail for use in performing medical and similar services for compensation. Although not used directly on patients by dentists, the products are used in a

program of preventive dentistry which is part of the overall medical services provided to their patients. Even though there is no separate fee charged for the products, the cost of providing the products is part of the fee for providing dental services. Petitioner's reliance on Matter of Plattekill Mountain Ski Center, Inc., State Tax Commission, March 9, 1984, is misplaced in that in Plattekill Mountain, the customers purchased admissions to a recreational facility which included a free emergency service. In the instant case, the patients were paying for a dental service and, therefore, equipment provided as a part of that service is taxable as medical equipment purchased at retail for use in performing medical and similar services for compensation.

D. That 20 NYCRR 528.4(b)(1) defines "drugs and medicines" as follows:

"(i) articles, whether or not a prescription is required for purchase, which are recognized as drugs or medicines in the United States Pharmacopeia, Homeopathic Pharmacopeia of the United States, or National Formulary, and intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in humans;

(ii) articles (other than food) intended to affect the structure or any function of the human body."

E. That, while fluoride when present in a toothpaste or mouthwash is not considered a drug qualified for exemption, when supplied in a form intended for direct topical application to the teeth, as petitioner sells it, fluoride is a drug sales of which are exempt from sales tax. Therefore, the \$428.18 in tax applicable to fluoride packages is cancelled.

F. That the laws of New York State are presumed to be constitutionally valid at the administrative level of the State Tax Commission.

G. That the petition of John O. Butler Company is granted to the extent indicated in Conclusion of Law "E"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued May 27, 1982 is to be modified

accordingly; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 30 1985

STATE TAX COMMISSION

Roderick W. Allen
PRESIDENT

Francis J. Koeng
COMMISSIONER

Mark J. Smith
COMMISSIONER